

# **Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings.**

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## **A. Introduction**

On Thursday 30<sup>th</sup> June the proposal for the recast of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereafter “Brussels IIa Regulation”) was published (COM, 2016). In the proposal the EU Commission identified six areas in need of improvement: the child return procedure, the placement of the child in another Member State, the requirement of exequatur, hearing the child, and the actual enforcement of decisions and cooperation between the Central Authorities (COM, 2016, 3-5).

In June 2015, the EU Commission received the findings and recommendations from the research project ‘Conflicts of EU courts on child abduction’. The full project findings have recently been published, and a detailed report of the cases can be found online (Beaumont et al, 2016a; 2016b). This project gathered and analysed proceedings involving Articles 11(6)-(8) and 42 of the Brussels IIa Regulation from every EU Member State apart from Denmark. The Article 11(8) procedure under the Brussels IIa Regulation allows the State of the child’s habitual residence to order the return of the child following a non-return order by the courts in the State where the child was abducted to under Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Convention). On the basis of the findings two proposals were put forward. The first proposal was that Article 11(8) of Brussels IIa should be scrapped. The revised Regulation should make the 1980 Convention work well within the European Union. We suggested it should build on Article 11

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of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental Responsibility and Measures for the protection of Children of 19 October 1996 (1996 Convention) regarding protective measures for the child and indeed go further to provide protective measures for the abducting parent, that criminal proceedings and fines where the abducting parent is willing to return should be removed, that Article 11 of the 1996 Convention should be used to enable urgent measures for access for the left-behind parent, and that all Member States should provide legal aid for 1980 Convention proceedings. The second proposal was that if Article 11(8) Brussels IIa was not scrapped then it was recommended that Member States should be required to provide legal aid for Article 11(8) proceedings, that there should be concentrated jurisdiction for Article 11(8) proceedings as well as Hague return proceedings, that Article 11(8) should only apply if the Hague non-return was at least partly based on Article 13(1)(b), that an Article 11(8) return order should only be made after a full welfare enquiry into the best interests of the child, that the courts need to adhere to the requirements to hear the parties, in particular more clarity was needed in relation to “opportunity given”, the court in the enforcing state should be able to refuse enforcement on limited grounds and that provision should be made to arrange for urgent provisional access (Beaumont et al, 2015, 21-26 and the slightly refined version in Beaumont et al, 2016a). Recommendations for setting a general standard for resourcing and staffing of Central Authorities and making it clear that Article 11 of the 1996 Convention applies in intra-EU cases by amending Article 61 and 62 of the Brussels IIa Regulation were also put forward.

This paper will focus on analysing the Commission’s proposed changes to the Brussels IIa Regulation relevant to parental responsibility and international parental child abduction in light of our recent research project findings. The option of scrapping the Article 11(8) override return mechanism was considered by the Commission in its Staff Working Document Impact Assessment (SWD (2016) 207 final at pp.41 and 45 as Option 4) but it was not regarded as the best option. Instead a reformed Article 11(8) Brussels IIa system (Option 3) was regarded as the best option (*ibid*, pp.40-48).

## **B. Concentration of jurisdiction for child abduction cases**

A particularly strong proposal is found within Recital 26 and Article 22. The suggestion that there is concentration of jurisdiction for Hague child abduction cases is welcome for the reason the Commission cites in Recital 26; ‘speeding up the handling of child abduction cases (...) because the judges hearing a larger number of these cases develop particular expertise.’

Recommendations for centralisation of jurisdiction in Hague cases have been prominent within academic writing for many years so it is gratifying to see this proposal.

One of the findings from the research project was that on occasion the reasoning within the decision for the Hague non-return under Article 13 was not clear (Beaumont et al, 2016a). In order to issue the Article 42 certificate, the judge in the State of origin had to confirm that they had taken the reasoning for the Hague non-return into account. Sometimes a judge was left to infer from the facts which Article 13 exceptions had been used (Beaumont et al, 2016a). Therefore, the proposal to increase clarity in the written decision when making the 1980 Hague non-return orders in Recital 30, Art 26(1), along with the requirement for concentration of jurisdiction, will hopefully lead to better non-return orders, particularly when handled by experts in centralised courts.

### **C. Limiting appeals and making the whole process timely**

A valid criticism of Hague child abduction cases can be attributed to the delays caused by the number of appeals that are possible in some Member States, sometimes meaning that cases are delayed within the courts for years (eg see *Povse* in Beaumont et al, 2016b, p18). Limiting the appeal to ‘one’ as proposed within Article 25(4) goes some way to supporting the Hague requirement for the prompt return of the child, whilst minimising the ability of the abducting parent to abuse the appeal system in their favour.

If the proposals to reduce the number of appeals to one and for Member States to put centralised jurisdiction in place are accepted, then another proposal which should support the prompt return of the child is provided by Recital 27 and Articles 23(1) and 63(1)(g) which clarify the time frame within which Hague cases are to be processed. Recital 27 and Article 63(1)(g) expects that the Central Authority ensures that the ‘file prepared with a view to such proceedings is complete within six weeks’, with Article 23(1) providing a six-week limit for the court proceedings at both first instance and appeal, giving a maximum total of 18 weeks, subject to an “exceptional circumstances” proviso. Although at first glance it could be argued that this is a backward step from the original Brussels IIa target of 6 weeks in total in Article 11(3) it is probably more realistic, and with the benefits of concentrated jurisdiction such as increased efficiency, greater expertise and limited appeals will actually reduce the average time for the return of the child in the long run.

Evidence as to whether mediation is successful in Hague cases is mixed. Parents who have reached the point of having to apply for the return of their child from another country are usually distressed and not open to mediation especially in the early stages (Beaumont et al, 2016b, p 139). The proposal within Recital 28 and Article 23(2) to see if the parties would be open to mediation and to instigate it as long as it does not ‘unduly prolong the return proceedings under the 1980 Hague Convention’ is a sensible one. Similar to the possible abuse of the appeal system, it is not unknown for the abducting parent, or even a Central Authority to use mediation as a method of prolonging a child abduction case to enable the children to remain in the State where the child was abducted to (see *Raw and Other v France* European Court of Human Rights (ECtHR) in Beaumont et al, 2016b, p 64). Although mediation can prove to be helpful in some cases, the abducting parent should not benefit from delays created either through lengthy appeals or through lengthy mediation the Commission is right to be cautious on this point.

#### **D. Reversal of *Povse***

It is clear that the Commission intend that the proposal reverses part of the decision of the Court of Justice of the European Union (CJEU) in Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-00673 (*Povse*) whereby national courts could make interim return orders under Article 11(8). The proposal focuses on final decisions made in the best interests of the child and several references are made to this throughout the proposal. According to the Commission the proposal ‘obliges the Member State where the child was habitually resident before the wrongful removal or retention to conduct a thorough examination of the best interests of the child before a final custody decision... is given’ (COM 2016, p 13). Recital 30 provides the explanatory text for this stating that an Article 13 refusal ‘may be replaced, however, by a subsequent decision given in custody proceedings after a thorough examination of the child’s best interests’ (Recital 17, as amended). In terms of the text of the Regulation the proposed Article 26(4), amended 11(8), provides that ‘the court shall examine the question of custody of the child, taking into account the child’s best interests as well as the reasons for and evidence underlying the decision refusing to return the child.’ Although Article 11(7) does include the word “custody”, the approach taken to this was somewhat skewed by the decision of the (CJEU in *Povse*. Now the term custody is retained in Article 26(3), currently 11(7), and used twice in Article 26(4), 11(8) as amended. This additional clarity confirms the original approach of the Regulation. A focus on custody and a full best interests test is preferable to an interim return order by the court of the habitual residence, following a Hague non-return order by the court where the child was

abducted to, as it provides more stability for the child and ensures that judges reach a decision that is in the best interests of the child. This also means that judges cannot override one summary order with another summary order. A full examination of the child's interests requires that the judges in the State of habitual residence are undertaking a different test, and analysis, to the judges in the State where the child was abducted to. The previous ability, created by the CJEU, to carry out the same summary analysis undermined mutual trust (Beaumont et al, 2016a, pp 225-227).

### **E. Hearing the child**

A child's right to be given the opportunity to be heard in civil proceedings is visibly protected under international law, by the United Nations Convention on the Rights of the Child (UNCRC) 1989 Article 12, and supposed to be protected under EU law by Article 24 of the Charter of Fundamental Rights of the European Union (the Charter) and the Brussels IIa Regulation. However, one of the most startling and indisputable findings from the research project was the revelation that the majority of children involved in Article 11(8) proceedings were not heard by the courts. Only 20% of the children in these cases were heard (Beaumont et al, 2016a, fig. 8). This is clearly unacceptable. The only justifications under Article 11(2) of Brussels IIa for not giving the child the opportunity to be heard would be that it was inappropriate due to their age and maturity, but this did not seem to fit with the findings. Varying reasons as to why this was happening were put forward during interviews with judges in different Member States. The differences in national procedural rules were identified as a reason why children under the age of 12 years were not being heard within some Member States. Several Member States whose national rules allowed for children over the age of 12 years to be given the opportunity to be heard, lowered the age for hearing the child in 1980 Hague Convention cases but not within Brussels IIa cases due to concerns that their Hague decisions would not be respected by other Member States (Beaumont et al, 2016b, p138). Yet differences in national procedural rules did not explain why children as old as 15, especially those where the Hague non-return order had been based on their objection to being returned, were not heard. Additional factors such as a lack of human and technological resources and the effect of the obstructive abducting parent on the child's right to be heard were also cited as contributory factors. Cases were also identified where judges had used the Articles 11(8) and 42 proceedings as a method of getting the child back so that they could hear the child, highlighting the difficulty of arranging for the child to be heard under the EU Taking of Evidence Regulation due to lack of time and resources. Therefore, the proposed changes to the Brussels IIa Regulation which clearly

recognise that these issues exist and aim to strengthen the right of the child to be heard in these cases is most welcome.

The proposed Recital 13 provides that the ‘grounds of jurisdiction in matters of parental responsibility are shaped in the light of the best interests of the child and should be applied in accordance with them. Any reference to the best interests of the child should be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child of 20 November 1989.’ Recognising the problems created by the diverging national rules governing the hearing of the child, the Commission also notes in their Explanatory Memorandum that ‘If a decision is given without having heard the child, there is a danger that the decision may not take the best interests of the child into account to a sufficient extent’ (COM, 2016, 4). Emphasis is again placed on the importance of the rights of the child within the Convention and the Charter of Fundamental Rights in the proposed Recital 23 which provides that the Member States have the ability to determine how the child is heard, where the child is heard and by whom but that they must do this whilst respecting the child’s rights. The underlying message is that the question left to national authorities is how the child should be heard, rather than whether the child should be heard.

The insertion of the new Article 20 on the ‘Rights of the child to express his or her views.’ is also welcome on many levels. Not only is the vocabulary positive in Article 20(1) that ‘the authorities of the Member States shall **ensure** that a child **who is capable** of forming his or her own views’ is given an opportunity to express their view (placing positive emphasis on the child’s capability rather than whether the judge regards it inappropriate to hear the child) but that it should be a ‘**genuine and effective** opportunity to express those views freely during the proceedings.’ Although as an aside it will be interesting to see how the courts determine what constitutes a ‘genuine and effective’ opportunity.

As before, the courts have to give due weight to the child’s views in accordance with his or her age and maturity but in Article 20(2) they now have to ‘document its considerations in the decision.’ By removing the term ‘inappropriate’ in relation to the factors of ‘age and maturity’ as found in the original Article 11(2), Article 20 is to be commended as it brings the Brussels IIa Regulation more in line with the approach taken within the United Nations Convention on the Rights of the Child

However, one suggestion would be that Article 20(2) ought to have included a requirement for the court to document its considerations in the decision as to whether the child is capable of forming/expressing his or her own views in order to uphold the Commission's intentions in the Explanatory Memorandum that they wished the courts to make the distinction clear between that point and the weight the judge gives to those views (COM, 2016, 15).

The Commission correctly observes in its Explanatory Memorandum that the courts applying the "overriding mechanism" (old Article 11(8) Brussels IIa) under its new proposal must hear any child "who is capable of forming his or her own views" even if the child is not physically present in that jurisdiction "using alternative means such as video-conferencing as appropriate." (COM, 2016, 13).

#### **F. Hearing the child and the Article 42 Certificate**

The proposal deletes Article 42 and the corresponding certificate, which was a necessary requirement when making a return order under Article 11(8) and has adapted the Annex II Certificate that had related to Article 39 (and expanded Article 39 now Article 53 to take into account Article 42) to incorporate the necessary elements for all matters concerning decisions on parental responsibility, including rights of access or the return of the child. The proposed Article 53(5) again emphasises the requirement that a judge can only issue a certificate if the child has been given a genuine and effective opportunity to express his or her views in accordance with Article 20. This is a welcome proposal as it will encourage clarity of thought and clarity in the decision and should lead to an increase in the number of children being heard. This request is reiterated within the Annex II Certificate at 11 and 12 as the court is asked to confirm that the child was given a genuine and effective opportunity to express his or her views and whether due weight was given to the child's views.

The clear determination by the Commission to protect the right of the child to be heard is to be commended. The findings from the research project found that judges in the majority of cases issued the Article 42 certificate even when the child had not been heard and therefore it was clear that judges needed to be held to account for their decisions (Beaumont et al, 2016a, pp 234-236). Therefore the move away from a 'yes' or 'no' answer to giving the child the opportunity to be heard to one where the judge has to explain his reasoning within his decision is to be welcomed.

Also welcome are the safeguards found within the new Art 54 which now allows for the certificate to be rectified and withdrawn albeit by the state of origin if it does not comply with Art 20. This is an improvement on the previous situation where a certificate could be issued and remained valid even if it contravened the rights of the child to be heard, see Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247 (*Zarraga*). So although it might have been helpful to have asked the judge a question within the certificate to justify their reasoning if they chose not to hear the child, the additional safeguards should help to improve the protection afforded to this right.

### **G. Article 40(2) – refusal of enforcement**

Under the current Articles 11(6)-(8), if there is a decision requiring the return of the child, and a certificate is issued under Article 42, then that decision must be enforced and enforcement cannot be refused on any ground. The CJEU also took a very strict interpretation of this provision in *Zarraga* and *Povse*, refusing the state of enforcement any room for manoeuvre even if it appeared that this enforcement would harm the child. However this strict approach did not guarantee these orders were enforced, 75 per cent were not (Beaumont et al, 2016a, fig. 7). The proposal introduces two grounds for refusal of enforcement under Article 40(2). The new approach could make judges and authorities more willing to attempt to secure enforcement of these orders, accompanied by a certificate, when they know that they can refuse enforcement in specific circumstances.

The proposal suggests that the enforcement should only be refused if enforcement would be manifestly contrary to the public policy of the Member State of enforcement. Nothing about this is controversial, public policy is one of the grounds for refusal of enforcement in the Brussels I (recast), prior to that it was a ground for refusal of recognition and enforceability in Brussels I, and it has previously been used to protect fundamental rights (*Krombach v Bamberski* (C-78/98) [2000] ECR I-10239). The recommendations highlighted in our working paper also suggest that the decision should be reviewable on fundamental rights grounds (Beaumont et al, 2016a, p 249). However, it is controversial that the court of enforcement will only be allowed to invoke its public policy if the breach of public policy is caused “by virtue of a change of circumstances since the decision” was given in the State of origin. The proposal states the only two bases on which a violation of public policy can be found. Firstly, the child now being of sufficient age and maturity objects to such an extent that the enforcement would



be “manifestly incompatible with the best interests of the child”. Secondly, “other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interests of the child”. The first effectively reverses one point in *Zarraga* where the German referring court asked the CJEU if they could refuse enforcement where enforcement would breach the rights of the child, in particular the right of the child to be heard under Art 24 of the Charter (*Zarraga* [37]). (However the proposal does not permit review of the certificate in the state of enforcement, regardless of whether the certificate and decision comply with the requirements in the certificate. The certificate is subject to review only in the State of origin, see section F above). This fits with the general approach of the proposal which seeks to give more weight to children’s rights in particular the child’s right to be heard and have their opinions taken into account. The second ground is in stark contrast to the CJEU decision in *Povse*, where the court precluded a review in the state of enforcement because of a change in circumstances even if the enforcement was manifestly incompatible with the best interests of the child (*Povse* [83]). The proposal may help in cases like *Povse*, where the father had initially visited the child in the State where the child was abducted to but stopped doing so shortly after the abduction (*Povse v Austria*, 18 June 2013 Application no. 3890/11 (*Povse* ECtHR discussed in Beaumont et al, 2015a, pp 56-61). By the time the case was heard by the ECtHR, 4 years after the abduction, the child no longer knew her father and did not have a common language with him. However there were two decisions, requiring return, given by the Italian court. The second which required the child reside with her father was given after there had been a complete breakdown in the relationship between the child and her father and the loss of a common language. Although there had been a change of circumstances between the first decision and the second decision, and enforcement of this second decision would be incompatible with the best interests of the child partly because it did not require that contact was re-established in an appropriate way before the child was returned to Italy, there was not necessarily a change of circumstances between the issuing of the second Italian order and its enforcement. Therefore it is not clear whether the second ground would work in such a case (the first ground might as the child clearly objected, bringing an application before the ECtHR). The provision could conceivably have been applied in some cases though (see for example, French CA No. 207DE2010, in Beaumont et al, 2016b, p 156).

By allowing the enforcing State to refuse enforcement on certain specified grounds the Commission has addressed concerns raised by many in relation to the current Regulation, which came to particular light in cases like *Zarraga* and *Povse* (Kuipers 2012; Kramer 2011;

Beaumont and Walker 2011). If the enforcement of the order would be manifestly incompatible with the best interests of the child then this should be sufficient whether or not there has been a change of circumstances since the decision in the State of origin. A positive note is the limitation of public policy to the best interests of the child rather than allowing the court to also take into account public policy in relation to the competing rights of both parents.

It is clear that the old system was not working, children were not being heard and the orders were not being enforced. Now that Article 11(6)-(8) is part of the Regulation, it can only be removed through a unanimous vote in Council which is improbable. It is unlikely that a perfect solution will be found, but the Commission's proposal for review at the enforcement stage at least alleviates some concerns and allows better protection for children. If the proposed Article 40(2)(a) encourages courts to listen to children more frequently and give more weight to their views then it must be seen as a positive change.

#### **H. Protective measures and links to the 1996 Convention**

Under the current system the court in the State where the child was abducted to can take measures to protect the child under national law. However there is no mechanism under the Regulation whereby these measures can be enforced in another Member State. Article 11(2) of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (1996 Convention) may provide a solution, but it is unclear whether the Convention can apply in intra-EU cases (Beaumont et al, 2016a, pp 220-221). The proposal resolves this problem in a number of ways. Firstly the revised Article 20, proposed Article 12, positively provides the authorities in the State where the child is present, with jurisdiction to take provisional and/ or protective measures in respect of the child. Currently this is just a negative provision in the sense that it does not prevent the authorities from taking such measures. The proposed Article 12 also requires the authorities in that State to inform the authorities in the Member State with jurisdiction for the substance of the dispute of these measures. The aim being that those authorities can implement these measures if necessary, on an event such as the child's return following an abduction. Secondly, the proposal moves this provision to the jurisdiction chapter which means any measures made under this provision can be recognised and enforced in another Member State. The new Article 48 clarifies that the enforcement provisions apply to non-*ex parte* provisional and protective measures. The proposed Recital 17 confirms that provisional and protective measures should be recognised

and enforced in all Member States, and Recital 29 indicates that these measures should be used, if possible, in cases of child abduction where there are concerns relating to the child's safety, that may prevent a return pursuant to Article 13(1)(b). Any protective measures taken under the proposed Article 12 continue to apply until the competent court has taken the measures it considers to be appropriate (Article 12(2); Recital 17; Recital 29).

These steps are all regarded as positive and they bring the Regulation in line with Article 11(2) of the 1996 Convention. The improvements made by the proposal are essential in order to ensure that children can be safely returned to the State of origin, in certain cases, with judges assured that the protective measures issued (also known as undertakings or mirror orders) now have a mechanism for being enforced in the State of origin. One concern that still remains is the protection of abducting parents, usually mothers, in cases where there is a risk of domestic violence. The provisions relating to protective measures apply specifically to measures in respect of "that child". On the other hand Recital 29 suggests that the court should order any measures of protection necessary to ensure the safe return of the child. It could be that in certain cases measures are ordered in respect of the child which could ensure the protection of the parent. If it is only safe for the child to return with the abducting parent, and that parent will only return if she has accommodation in a safe house, then requiring the child is placed in suitable accommodation with the abducting parent could be a suitable measure. The requirement that the relevant authorities in each Member State communicate about the measures will help to ensure that suitable measures are arranged (Article 12(1) and Recital 29). Such an interpretation will still present a problem where there are criminal proceedings pending. However, one would hope that the increased emphasis on cooperation will allow relevant authorities to reach a solution whereby the abducting parent would no longer be subject to criminal proceedings if they return with the child. If the authorities in the State of origin refuse to cooperate with such a request, and the child cannot return without the parent, then it is perfectly understandable if the courts in the State where the child was abducted to refuse to return the child pursuant to Article 13(1)(b).

In addition to providing proper provision for protective measures, similar to the provisions in Article 11(2) of the 1996 Convention, the proposal further clarifies the relationship between the Regulation and the 1996 Convention. In general terms the Regulation applies when the child is habitually resident in an EU Member State bound by Brussels IIa. It also applies to the recognition and enforcement of decisions between EU Member States bound by Brussels IIa, regardless of whether the child is habitually resident in a third State (Article 75(1)). However,

there are some exceptions to these general rules. In cases where there is a choice of court agreement in favour of a court in a non-EU 1996 Hague Contracting State then Article 10 of the 1996 Convention applies (Article 75(2)(a)). Where the authority in a Member State wishes to transfer jurisdiction to a third State, which is a Contracting State to the 1996 Convention, then Articles 8 and 9 of the 1996 Convention apply (Article 75(2)(b)). This provision will be particularly useful after Brexit (the UK leaving the EU) because it clarifies that the 1996 Convention will apply to transfers of jurisdiction between the UK and EU Member States after the UK leaves the EU (assuming that Brussels IIa will no longer apply to the UK and that the 1996 Convention will continue to apply in all EU States and in the UK). In this respect the 1996 Convention is better than Brussels IIa because the process for requesting a transfer can be initiated by either the courts of the habitual residence of the child or by the courts of another Contracting State that believes those courts are better placed to assess the child's best interests rather than just by the former courts (see current Article 15 - proposed Article 14 - of Brussels IIa). The provision also seeks to regulate *lis pendens* between Member States and third States which apply the 1996 Convention. In such cases where the authorities in a third State are seised first then the authorities in the Member State shall apply Article 13 of the 1996 Convention. Again this will be very useful post-Brexit as it will reduce the chance of having two sets of proceedings relating to the same child and the same cause of action ongoing in the UK and another EU Member State.

## **I. Central Authorities**

One of the difficulties when trying to trace the Article 11(8) cases was due to the fact that these cases do not need to go through the Central Authorities; which was something the Central Authorities seemed to find frustrating having been involved throughout the Hague process. In a similar vein, although the provisions on protective measures place an emphasis on cooperation, this cooperation may involve Central Authorities or it can occur directly through judges and/ or other authorities. The advantages of Article 11(8) cases going through the Central Authorities are the ability of the Central Authority to aid in hearing the parties, support mediation and also to be able to provide complete data on child abduction cases to the Commission, therefore recommendations were put forward in relation to creating minimum standards for Central Authorities, improved data collection, improved in-house knowledge such as by guaranteeing access to an in-house lawyer and video conferencing facilities to

increase access to justice for all parties involved (Beaumont et al, 2016a). Unfortunately the decision to communicate Article 13 Hague non-return decisions remains optional in the proposal between the court and the Central Authority (COM, 2016, Art. 26(2)). However the proposal does require that Member States collect specified data and make this available to the Commission on request (Article 79(2)).

Article 61 provides that “Member States shall ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation”. This is positive because often Central Authorities are under staffed and under resourced (Walker, 2015; Beaumont et al, 2016a). The proposed changes to the duties of the Central Authorities support improved communication and cooperation, particularly in relation to providing information in relation to the child and securing safe access or contact between a child and the non-resident parent. Therefore by ensuring increased funding for these areas it should in theory make the Central Authorities more efficient. The specific requirements in the proposal to ensure adequate resources for Central Authorities and to provide information, should make it easier for the Commission to bring proceedings against a Member State under Article 258 TFEU for breach of EU Law where this is not happening.

## **J. Other points to note**

The proposal includes a definition of child to cover any person up to the age of 18 (Article 2(7)), so that parts of the Regulation should apply to 16 and 17 year olds. The provisions on child abduction continue to only apply to children up to the age of 16 (Recital 12) as is the case with the 1980 Convention. The intention behind this change is to bring the Regulation in line with the 1996 Convention, which applies to 16 and 17 year olds (Recital 12), in relation to non-child abduction child related matters within the scope of the Regulation. This means that persons of all ages have the opportunity of being protected either by the instruments that relate to “children” or under the Hague Convention of 13 January 2000 on the international protection of adults (2000 Convention), if they are 18 or over. In some respects, this is positive as the system does provide some form of protection for people of all ages, if measures do need to be taken to protect a particular individual. However, since 17-year-old “children” are permitted to get married, have their own children, drive a car and vote it should be very unusual for a judge to make an order in relation to these “children” when the law considers them to be perfectly capable of making their own decisions. Indeed one assumes that the protection of 16 and 17

year old children in Brussels IIa and the 1996 Convention might be more analogous to the scope of the protection offered by the 2000 Convention which is restricted to “adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.” In this respect it is positive that the age for parental child abduction has not been extended beyond 16.

Another point is the Commission’s extensive use of Recitals. The number of Recitals has increased from 33 to 57 and many of the individual Recitals have increased in length. Although this can be understood in the light of the Commission’s strive for clarity judges will be required to do a lot of reading of the recitals and the Regulation without any systematic guide as to how they are all connected and what was intended by them. It could be therefore that an explanatory report would be more beneficial alongside crisply drafted and succinct Recitals on major points of interpretative clarification. One benefit of the Hague style explanatory report is that it is clear which explanation coincides with which Article of the Convention. In contrast a judge needs to read all the Recitals and the Articles in a Regulation in order to determine how they relate to each other. The Pérez Vera report on the 1980 Convention (1982) is regularly cited by authorities dealing with child abduction cases (Schuz, 2013, 95). It is important that the Regulation has some form of explanation of its provisions, but it is questionable whether Recitals are sufficient. Explanatory reports should be introduced in the EU for important Regulations at least in the field of private international law (see Beaumont et al, 2017).

## **K. Conclusion**

The information gained during the course of the research project indicated that Article 11(6)-(8) Brussels IIa was not working in its current form. Parties were not being heard, many decisions were issued which were not final and these orders were rarely enforced despite being automatically enforceable. As such we recommended that the procedure was either scrapped or that it was extensively revised in order to make it more workable and to protect the rights of the parties. Although the Commission rejected the option of scrapping the procedure after giving it serious consideration in the impact assessment (perhaps realistically as we expected because it was not a politically attainable option given the requirement of unanimity in the Council) the proposal certainly does suggest major changes which are in keeping with the spirit and sometimes the letter of our proposals for reform. In particular the Commission’s proposals in relation to the provisions for hearing the child, the requirement for full welfare decisions before return orders are made and the new ability for the court in the State where the child is

present to refuse enforcement of the court of habitual residence's return order on the basis of public policy if the enforcement of the order is manifestly incompatible with the best interests of the child are consistent with our recommendations.

Other positive improvements in the area of child abduction are concentration of jurisdiction, limitations of appeals in order to prevent undue delay and guarantees for the enforcement of protective measures. Two other important developments of note which are consistent with our suggested improvements are the increased clarity in the relationship between the Regulation and the 1996 Convention (now particularly important for the UK with Brexit pending) and the numerous improved provisions on Central Authorities. Overall the proposal is a major improvement on the current Regulation, particularly in the area of child abduction and the procedure following an Article 13 Hague 1980 Convention non-return order. It is not perfect, but it is unlikely that such an instrument ever will be when it has to take account of competing policies and concerns from 28 (or 27 or even 26) Member States.

## **Bibliography**

Beaumont P, Danov M, Trimmings K, Yüksel B (eds) (2017) *Cross-Border Litigation in Europe* (Hart Publishing)

Beaumont P, Trimmings K, Walker L, Holliday J (2015a) 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' 64 *International and Comparative Law Quarterly* 39.

Beaumont P, Walker L, Holliday J (2015), 'Conflicts of Courts in the EU on Child Abduction: Project Findings and Recommendations.'

Beaumont P, Walker L, Holliday J (2016a) 'Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) proceedings across the EU' 12 *Journal of Private International Law* 211. The working paper is available at [http://www.abdn.ac.uk/law/documents/CPIL\\_Working\\_Paper\\_No\\_2016\\_1.pdf](http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf).

Beaumont P, Walker L, Holliday J (2016b) Country Reports, <http://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php>

Beaumont P and Walker L (2011) 'Shifting the balance achieved by the abduction convention: The contrasting approaches of the European Court of Human Rights and the European Court of Justice' 7 *Journal of Private International Law* 239.

Commission EC (2016) 'Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM (2016) 411/2 [http://ec.europa.eu/justice/civil/files/family-matters/brussels2\\_regulation\\_en.pdf](http://ec.europa.eu/justice/civil/files/family-matters/brussels2_regulation_en.pdf) accessed on 7 July 2016.

Kramer X (2011) 'Abolition of Exequatur under the Brussels I Regulation: Effecting and Protecting the Rights in the European Judicial Area 4 *Nederlands Internationaal Privaatrecht* 633

Kuipers JJ (2012) 'The (Non) Application of the Charter of Fundamental Rights to a Certificate for the Return of the Child' *European Human Rights Law Review* 397

Pérez-Vera E, (1982) The Explanatory Report on the 1980 Hague Convention (HCCH)

Schuz R, (2013) The Hague Child Abduction: A Critical Analysis (Hart Publishing)

Walker L (2015) *Maintenance and Child Support in Private International Law* (Hart Publishing)